> television industry has become a dominant nationwide medium.[16]

Similarly, the Complaint points out that cable has replaced over-the-air broadcasting as "the nation's major television distribution medium," and notes that "approximately 3,660,000 households subscribe to a cable service" in New York. Complaint at ¶ 33.

Congress has expressly sought to encourage competition to cable, particularly because cable service is typically provided by only one operator in each local community.[17] Congress was concerned by rising cable rates, poor customer service and the general implications for "the flow of news, information and entertainment to the American people" arising from cable's market power.[18] It recognized the public importance of encouraging emerging MVPD competitors to cable, because "[f]air competition in the delivery of television programming should foster the greatest possible choice of programming and should result in lower prices for consumers."[19] Thus, a principal purpose of the legislation was to promote MVPDs using "alternative and new technologies."[20] Such alternative distribution media include: Multichannel Multipoint Distribution Service ("MMDS" or "Wireless Cable"), Satellite Master Antenna Television systems ("SMATV"), Television Receive-Only

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16. The Act, § 2(a)(3).

17. See id. at (a)(2).

18. House Committee on Energy and Commerce, H.R. Rep. No. 102-268, 102d Cong., 2d Sess. (1992) ("House Report") at 26.

19. Act §2(a) H.R. Rep. No. 102-862, House Comm. on Energy & Commerce, 102d Cong., 2d Sess. (1992) ("Conference Report"), at 53; see Act, § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views through multiple technology media."); § 2(b)(1) (stating that it is the policy of Congress to "promote the availability to the public of a diversity of views through cable television and other distribution media").

20. House Report at 27.

("TVRO") satellite programming services[21] and DBS.[22] These alternative distribution media are in their commercial infancy. Each has its distinct characteristics which offer consumers a choice, but as yet remain untested in the mass market. Without access to programming, however, none of the MVPD competitors to cable using these new media will emerge as a strong and robust challenger.

Of all of the emerging MVPD alternatives technologies, high-power DBS has long been recognized as perhaps the most formidable nationwide potential medium capable of competing with cable television.[23] High-power DBS service involves the provision of multichannel video programming service to "dinner plate"-size home dishes approximately eighteen inches in diameter, via satellites operating at high-power levels in the higher frequency direct broadcast portion of the Ku band.[24]

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG has been licensed by the Federal Communications Commission ("FCC") to provide high-power DBS service.[25]

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21. Currently, using C-band technology, NRTC and its members provide various packages of satellite-delivered programming, called "Rural TV®," to more than 70,000 TVRO subscribers. C-band technology requires the use of six to twelve foot receiving antennas.

22. See Competitive Impact Statement at 33,948 for a description of these MVPD services; see also 1990 Cable Report, 5 FCC Rcd 4962, 5013 (1990).

23. See Competitive Impact Statement at 33948 (observing that because "of its small dish size and lower installation cost, high-power DBS is considered to be a potential competitive threat to cable"); House Report at 46 (citing RAND Study below and agreeing that "during the 1990's, high-powered DBS systems have greater potential for widespread competition with cable systems than do other multichannel video alternatives"); Leland Johnson and Deborah R. Castleman, Direct Broadcast Satellites: A Competitive Alternative to Cable Television, R-4047-MF/RL (Rand 1991), at 78 (concluding that widespread competition to cable is most likely to come from high-power DBS) (included as Appendix 2).

24. See Competitive Impact Statement at 33,948.

25. See United States Satellite Broadcasting Co. and Hughes Communications Galaxy, Inc., 7 FCC Rcd 7247 (1992).

DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family. NRTC has entered into a DBS Distribution Agreement with HCG to provide services to rural subscribers across the country.[26]

Following the launch of the first high-power DBS satellite scheduled for December 1993, DirecTv will initiate the first such DBS service in the United States in early 1994, operating from an FCC-assigned orbital location of 101°. With its full complement of satellites in orbit, DirecTv will have the technology to provide more than 150 channels of video programming directly to households throughout the United States. NRTC will market and distribute approximately 20 channels of video programming to rural households.

Another separate DBS provider, United States Satellite Broadcasting Company, Inc. ("USSB"), will also begin operation of a high-power DBS system from the 101° orbital position in 1994, utilizing a five-transponder "payload" located on the first of HCG's two satellites to be co-located at 101°.[27] USSB will thus have the technological capability to offer approximately 30 channels of video programming to consumers. Although a number of other applications to operate DBS satellites have been granted by the FCC, only DirecTv and USSB are licensed to provide operational high-power DBS service in this decade. Thus, for the period of time encompassed by the Decrees, the developing high-power DBS industry

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26. See supra note 8.

27. Rather than constructing and launching its own satellite, USSB entered into an agreement with HCG to purchase a payload of 5 transponders on one of the HCG satellites to be located at 101°. USSB will retain full operational control over its transponders, and will have sole discretion as to the content of programming transmitted over those five transponders. See United Satellite Broadcasting Co. and Hughes Communications Galaxy, Inc., 7 FCC Rcd at 7249. Thus, although operating from the same satellite, DirecTv and USSB are direct competitors.

will consist of a universe of two licensees, with DirecTv possessing the greater amount of channel capacity.[28]

Although high-power DBS may be the most promising nationwide potential technological competitor to cable television, technological capability is meaningless without the ability to obtain and offer quality programming to subscribers. Thus, in 1990 the FCC observed that DBS "could become a strong competitor [to cable] by the mid-1990s if . . . DBS can obtain reasonable access to programming."[29] Similarly, the Complaint acknowledges:

> Programming is the lifeblood of the multichannel subscription television industry. A competitor to cable television must be able to offer a substantial number of programming options to consumers. Beyond mere possession of programming, a competitor must have the ability to deliver particular programming which consumers have come to associate with multichannel subscription television (e.g., CNN, ESPN, MTV, HBO, Nickelodeon, Showtime, Cinemax, The Disney Channel, TNT and USA).[30]

In this regard, most "marquee" multichannel subscription programming is supplied by companies that are vertically integrated with cable MSOs.[31] Historically, these vertically

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28. While high-power DBS is commercially attractive, there are only two orbital locations other than 101° that can offer optimum coverage of the entire continental United States. Moreover, the capital commitment required to construct, launch and operate a DBS satellite is quite extensive. These factors principally account for the limited number of competitors in this segment of the MVPD industry.

29. 1990 Cable Report at 5020 (emphasis supplied).

30. Complaint at ¶ 42; see also 138 Cong. Rec. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin) ("It will do us little good to hope in vain for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to [the cable] monopoly if none of it can get programming. Programming is the key.").

31. The House Report notes that, according to the National Cable Television Association ("NCTA"), 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. House Report at 41. Two MSO defendants in this proceeding, for example, Time Warner and Viacom, supply such "showcase" services as Home Box Office, Cinemax, Showtime, The Movie Channel, MTV, Nickelodeon, Comedy Channel, E!

(continued...)

integrated programmers have been either flatly unwilling to deal with alternative MVPD cable competitors, or have done so only at highly discriminatory rates, terms and conditions.[32]

As a DBS provider, DirecTv has had first-hand experience attempting to negotiate contracts with vertically integrated programmers to obtain programming that is vital to any viable MVPD business. As of late January 1993, DirecTv had been unable to announce any programming deals with vertically integrated programmers. After the Act was passed, the "log jam" began to break and DirecTv was able to enter into its first agreements with vertically integrated programmers. But, to this date, less than six months from launch of its first satellite, DirecTv has still been unable to reach an agreement directly with either of defendants Time Warner and Viacom to allow DirecTv and NRTC access to two of the most popular and most essential examples of multichannel programming, HBO and Showtime.

31.(...continued)
Entertainment Television, among others. Competitive Impact Statement at 33,948; see Complaint at ¶ 44. TCI, the nation's largest MSO, owned financial interests in American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore. Senate Comm. on Commerce, Science & Transportation, 102d Cong., 1st Sess. (1991) at 25 ("Senate Report"). These interests were subsequently transferred to its successor "spin off" corporation, Liberty Media. Liberty Media Decree at 2.

32. See 1992 Cable Act § 2(a)(5) (finding that the cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. . . vertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies"); Program Access Order at 4, ¶ 9 (observing that "in enacting the program access provisions of the Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public"); see also 1990 Cable Report, 5 FCC Rcd. at 5031 ("It seems fairly clear from the above facts that vertically integrated MSOs have the ability to limit competition to particular programming services."); Id. at 5015 ("The record shows that programming is not available on the same terms and conditions to wireless cable operators as it is to traditional cable operators.").

The cable industry also sought to hinder DBS providers' access to programming in another way as well. As alleged by both the plaintiff States and the Department of Justice, the MSOs formed Primestar in response to the "threat of cable-competitive entry into medium or high-power DBS,"[33] and in order to "suppress and eliminate DBS competition in the delivery of multichannel subscription television programming to consumers."[34] As further alleged by the plaintiff States, defendants "designed and structured their DBS venture in order to reduce the potential for direct competition" with their cable systems, in order to "undermine the ability of any cable competitive DBS service to develop."[35]

B. The Legislative and Regulatory Effort To Combat Cable's Anti-Competitive Effort To Dominate The MVPD Industry

Congress enacted the Cable Act in order to prevent the vertically integrated cable companies from choking off the program access that is essential to a pro-competitive MVPD industry structure and vital to ensuring and encouraging program diversity. First, Section 19 of the Act, 47 U.S.C. Section 628, expressly prohibits unfair and discriminatory practices in the sale of satellite cable and satellite broadcast programming. The avowed objective of Section 628's "program access" provisions is to increase the availability of programming to new and existing alternative MVPDs in order to promote diversity and competition.[36] The FCC's regulations contained in the Program Access Order implement

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33. Competitive Impact Statement at 33,949; see Complaint at ¶¶ 51-62.

34. Complaint at ¶ 52.

35. Complaint at ¶ 58.

36. See, e.g., Conference Report at 93 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable").

Congressional intent in enacting Section 628.[37] The FCC's new rules are grounded in Congress's express concern that "potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public."[38]

C. Overview Of The Proposed Consent Decrees

Both the Antitrust Division of the Justice Department and the Attorneys General of a large number of States also pursued a coordinated investigation into the cable MSOs' anticompetitive efforts to restrict program access. The State investigation concluded that alternative MVPDs "have been thwarted by the cable companies which conspired to prevent their competitors from obtaining good programming."[39] The instant lawsuit, arising from the investigation, was accordingly brought to obtain broad equitable relief, including an order that the defendant MSOs provide program access or reasonable terms to all MVPD competitors. Complaint at Prayer for Relief ¶ D.

Nevertheless, the parties now seek approval of three separate Decrees with purported access protections so discriminatory as to certain MVPD industry segments, and so riddled with exceptions, that they are anticompetitive. These provisions are also fundamentally at odds with certain key Cable Act provisions protecting program access. The Decrees are described briefly below.

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37. Significantly, however, the battle with respect to the FCC's program access regulations is not over. On June 10, 1993, nine petitions for reconsideration of the program access rules were filed at the FCC, including petitions by Liberty Media, Time Warner and Viacom. See 58 FR 34,800 (June 23, 1993) (providing public notice of nine petitions for reconsideration of the FCC's program access rules).

38. Program Access Order at 4, ¶ 9.

39. Abrams Announces Settlement With Cable Television Industry, Press Release (June 9, 1993) (included as Appendix 3).

1. <u>The Primestar Decree</u>

The Primestar Decree constitutes the heart of this proceeding. The "Primestar Partner Services" listed on Exhibit B to the decree include HBO, The Discovery Channel, The Learning Channel, E! Entertainment Television and Cinemax.[40] The Primestar Decree generally requires the MSOs to provide these Primestar Partner Services to all MVPDs, subject to certain exceptions. In particular, subsections IV.A.1.(a)-(f) of the Primestar Decree impose upon the Primestar defendants certain obligations to deal with DBS and MMDS providers. These provisions appear to be generally consistent with (though much less pro-competitive than) the provisions of the Act and its regulations.[41]

Section IV.A.1.(g), however, singles out high-power DBS for especially unfavorable treatment. Subsection (g) "supersedes" the preceding protections of (a)-(f) by providing that the Primestar Partners need not deal with more than one high-power DBS provider at the 101° orbital location.[42] As indicated above, DirecTv/NRTC and USSB will be the only high-power DBS providers in operation during the Decree period, and will both operate at the 101° location. Thus, Subsection (g) expressly allows each Primestar Partner to refuse to deal with at least 50% of that industry segment.[43]

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40. <u>See</u> Primestar Consent Decree at IV.A.1.(a).

41. For programming services in which they do not have a controlling interest, the Primestar partners are obligated under Section IV. B. of the Decree not to "seek or support" conduct or arrangements inconsistent with the protections set forth in IV.A., were such services subject to them. These "non-controlled programming services" are listed on Exhibit D to the Decree.

42. Although there are certain conditions that must be met in order to trigger Subsection (g)'s program access exception for DBS, <u>see</u> Primestar Consent Decree, § IV A.1.(g)(i)-(iii), there is no realistic prospect that these conditions will not be met.

43. Subsection (g) also allows for the similar exclusion of high-power DBS operators at other orbital locations, should any ever materialize, if the Primestar Partners deal with at least one provider (of their choosing) at that location.

In addition, Section IV.A.1.(g) of the Primestar Decree states that any agreements made at orbital locations other 101° shall be made on terms which shall in no case be less favorable than the price or terms agreed to between the Primestar Partners and the first DBS provider at the 101° location. This is the only example in the Decree of rates not defined by reference to the prices and business terms offered to a cable operator serving a comparable number of subscribers. It is set instead by reference to whatever separate rate the MSOs are allowed to charge to high-power DBS providers. In other words, all competitors get access at cable rates -- except high-power DBS providers, who get it at a separate high-power DBS rate, if they get it at all.[44]

The impact of this provision could well make it extraordinarily difficult for the high-power DBS industry to compete. DirecTv understands that, after the passage of the Act but before the filing of the Decree, USSB had already entered into arrangements for access to HBO, Showtime and MTV and other related services. DirecTv also understands that these agreements may have been entered into at rates far higher than those comparable cable providers must pay. Thus, the Primestar Decree for high-power DBS sets up a discriminatory market allocation scheme that allows for rates significantly higher than cable rates, and a market structure significantly at odds with Congress' policy and the FCC's implementation of that policy.[45]

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44. Significantly, the Liberty Media Decree does not single out DBS in this manner, and provides that the price and terms offered to individual DBS providers shall be compared against those offered to comparably sized cable operators. Liberty Media Decree at 5, ¶ 2(a)(ii). The reason is that the Liberty Media Decree does not cover any competitively significant programming. See infra at 15.

45. The last sentence of IV.A.1.(g) of the Primestar Decree contains a so-called "savings clause," which purports to re-institute the access protections in (a)-(f) "for all DBS providers" if the Act or its implementing regulations prohibit the scheme set forth in (g), i.e., prohibit exclusive contracts with high-power DBS providers or require that access be made available to all high-power DBS providers. As argued infra, this clause only highlights the Decree's anticompetitive effects on DBS and the MVPD industry.

2. The Viacom Decree

The proposed Viacom Decree, while organized and worded slightly differently, is substantially similar to the Primestar Decree. Like the Primestar Partners, Viacom controls several critical programming services: Showtime, The Movie Channel, MTV, VH-1 and Nickelodeon.[46] Section IV.A.1.(j) of the Viacom Decree essentially mirrors Section IV.A.1.(g) of the Primestar Decree, described above.

3. The Liberty Media Decree

The simplest of the Decrees is the proposed settlement between the plaintiff States and Liberty Media Corporation. Liberty Media is an owner of both cable programming and operating interests, with substantial ownership interests in Encore (90%) and American Movie Classics (50%), two premium movie channels, as well as minority interests in such services as The Family Channel, QVC Network, Black Entertainment Television ("BET"), The Jukebox Network, and Court TV.[47]

While the Liberty Media Decree does not contain the anticompetitive market allocation restrictions set forth in the other Decrees, the Liberty Media Decree's purported access protections are in fact meaningless, because the Decree expressly exempts from its coverage all of Liberty Media's prime services, along with virtually any others that might be remotely valuable to an MVPD cable competitor.[48] The Liberty Media Decree thereby

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46. See Viacom Decree at IV.A.1.(a).

47. See Senate Report at 25; Liberty Media Consent Decree at Exhibits B and C.

48. The protections of the Liberty Media Decree apply only to "Wholly Owned Existing Services," which consist of three minor programming services listed on Exhibit B to the Decree. Liberty Media's competitively significant programming is either specifically exempted from the decree in the definition of "Existing Services," or is defined as a "Partially Owned Existing Service" listed on Exhibit C. As to these latter services, the decree merely obligates Liberty Media not to seek or support any conduct or arrangements inconsistent with the access protections for "Wholly Owned Existing Services," but does not obligate Liberty Media to provide or even to facilitate access to such programming, even though it owns as much as 50% of some of these services.

reveals that the Primestar partners are willing to build legitimately pro-competitive terms into a settlement only if that settlement otherwise excludes any meaningful grant of program access from its scope.

IV. THE REASONS THE PROPOSED CONSENT DECREES ARE NOT IN THE PUBLIC INTEREST AND SHOULD NOT BE APPROVED

A. The Consent Decrees Sanction An Anticompetitive And Discriminatory Scheme for High-Power DBS

As shown above, the two principal decrees overtly sanction an anticompetitive arrangement permitting access exclusion only with respect to high-power DBS. There is no legal or public policy rationale for singling DBS out in this fashion. Moreover, sanctioning such an arrangement will retard significantly the development of the service to the ultimate detriment of MVPD competition.

As DirecTv/NRTC and USSB will provide the only high-power DBS service in the foreseeable future, the proposed decrees permit the MSOs to pursue a strategy of excluding over 50% of that key industry segment (and probably the potentially strongest competitor) from access to vital programming. Indeed, USSB has already obtained access to the premium programming that "consumers have come to associate with multichannel subscription television --"[49] HBO and Showtime. Without these services, DirecTv/NRTC would stand at a severe competitive disadvantage relative to cable.

The Decrees would also permit the defendants to sell an incomplete set of different critical programming on an exclusive basis to each of USSB or DirecTv, thus potentially denying high-power DBS providers at 101° access to the full menu of key programming they must have to attract subscribers. The cable monopolies would then face only "hobbled" DBS competitors.

49. Complaint at ¶ 42.

The Decrees also fail to protect access to programming for DBS competitors to cable at reasonably competitive prices. By enshrining possibly higher than cable rate deals with MSO defendants as the benchmark for the reasonable price and business terms to be offered DBS providers operating from other orbital locations, Section IV.A.1.(g) of the Primestar Decree and Section IV.A.1.(j) of the Viacom Decree effectively permit vertically integrated programmers to charge high-power DBS providers higher rates than they charge to comparably situated cable providers. There is neither a pro-competitive rationale for such a pricing differential, nor a principled justification for such a different benchmark for high-power DBS.

This is not a case that can be dismissed merely by invoking the litany that "the antitrust law protects competition and not competitors." The Decrees permit the defendant MSOs to refuse to deal at all with at least 50% of the high-power DBS industry, or to deny either high-power DBS provider a full and adequate menu of programming. By these means, the Decrees permit the defendant MSOs to cripple half or all of the high-power DBS segment of the MVPD industry. No reasonable basis exists for singling out potentially the strongest nationwide competitor to cable for such treatment. Moreover, if only a particular competitor and not competition is at stake, why are the MSO defendants so anxious to exclude high-power DBS providers from the protective scope of the Decrees?

If the Decrees are entered in their current form, high-power DBS can expect to be disadvantaged in crippling ways. Unlike other competitors, a high-power DBS competitor will be unable to enforce a right to program access through the simple mechanism of a Decree. It will be forced instead to rely on a comparatively complicated and expensive antitrust proceeding to enforce such rights, or to utilize FCC processes, the final contours of which are not yet clear. Moreover, the knowledge that all in the industry will have of any high-power DBS provider's inability to enforce a right to access through the Decrees -- or to obtain that access at cable competitive prices -- will inevitably weaken the high-power DBS provider's leverage as compared to other actors in the industry. It will be harder for the high-power DBS providers to negotiate their program access contracts, and for such providers to obtain access at reasonable rates.

To require a particularly promising industry segment to suffer such artificial disadvantage, without justification, is contrary to the public interest.[50] The end-result will likely be higher prices and reduced program diversity for customers.

B. The Proposed Decrees Are Utterly Inconsistent With The Market Structure Mandated By Congress In The Act

The Decrees do not stand simply as conventional settlements of private antitrust actions. First, the lawsuits by the States were one of two key steps in government's efforts to regulate the MVPD industry. The suits accordingly purport to address fundamental questions concerning what constitutes anticompetitive, unfair and discriminatory conduct in the MVPD industry. Second, a parens patriae case is by definition of public importance. See In re Montgomery County Real Estate Antitrust Litigation, 452 F. Supp. 54, 60 (D. Md. 1978).

The Decrees themselves correspond to the comprehensive scope of the States' complaints. They purport to impose a comprehensive scheme for enforcing program access. However, because the scheme established by the Decrees is fundamentally at odds with Congressional and FCC action implementing the Act, that scheme should be rejected.

The irony of a proposed antitrust settlement that undercuts a pro-competitive statutory and regulatory scheme is reflected in many facets of the Decrees. For example,

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50. Even if high-power DBS were to suffer these disadvantages only for the years it would take to establish and enforce a right to access in a legal proceeding, its unique lack of a full complement of key programming during that critical start-up period would surely render its viability more fragile than the interests of competition should permit.

Subsection IV.A.1.(g) of the Primestar Decree appears to violate the Act's general prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming . . . to consumers." 47 U.S.C. § 628(b) (emphasis supplied). By sanctioning exclusive arrangements between vertically integrated programmers and one DBS provider at a particular orbital location, the provision permits such programmers to completely preclude another DBS provider operating from the same orbital location from offering the programming to its subscribers.[51] In addition, the provision runs afoul of the non-price discrimination provisions in Section 628(c) because it condones a refusal to sell "to a particular distributor when the vendor has sold its programming to that distributor's competitor."[52] Finally, if (as appears to be the case already) the pricing of the exclusive contract between the first DBS operator and a vertically integrated programmer is higher than comparable rates charged to cable operators, it enshrines a pricing term at odds with Section 628(c)(2)(b) of the Act.

Congress specifically sought to create as much competition as the marketplace would permit, and to severely limit exclusive contracts because it perceived them to operate in a manner contrary to that objective in the current marketplace.[53] Subsection (g) cuts in precisely the opposite direction by embracing refusals to deal and exclusivity, an approach

51. See 1992 Cable Act, § 628(c)(2)(C).

52. See Program Access Order at 54, ¶ 116. The FCC construes non-price discrimination by a programming vendor between competing distributors as falling within Section 628(c) of the Act. Id. The FCC has used the example of a vertically integrated programming supplier's "unreasonable refusal to sell" programming "to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." Id. (emphasis supplied).

53. See Program Access Order at 26, ¶ 63 ("Congress has clearly placed a higher value on new competitive entry than on continuation of exclusive distribution practices that impede this entry.").

explicitly rejected by Congress. It is not in the public interest for antitrust consent decrees to be used to codify a set of rules for an industry which not only fails to protect competition as fully as the regulatory scheme that governs that industry, but also begins with a presumption that is actively contrary to the regulatory scheme.

Subsection (g)'s last sentence is particularly revealing. It implicitly concedes that the exclusivity and discriminatory treatment it sanctions is fundamentally at odds with the intent of Congress and the Act. Its lame provision that it will be deemed to extend the pro-competitive protections of the Decree to high-power DBS only if federal law is determined to do so fails to alleviate the burdens on high-power DBS described above.

The "savings" clause essentially is an afterthought. In its affirmative operation, Subsection (g) presumptively favors the Primestar defendants' continued ability to engage in exclusionary and discriminatory practices over a significant class of MVPDs that the Decree as a whole purports to protect. In conducting its public interest inquiry, the Court should consider the Decree in the manner in which it is affirmatively intended to operate - not according to a "savings" clause which would require high-power DBS to prove that it is covered by the Act in order to win protection under the Decree. Further, if there is no public interest or consumer protection rationale for Subsection (g)'s anticompetitive exclusion, then its continued presence can serve no purpose other than to "muddy the waters" in interpreting and understanding the Act's protections. As argued directly below, this is a real and invidious danger of allowing the "savings" clause to justify Subsection (g)'s presence in the Decree.

C. In All Events The Proposed Decrees Should Be Modified To Eliminate The Possibility Of Any Persuasive Or Precedential Effect On Other Proceedings In Other Forums

One additional significant danger that could result from this Court's approval of the Decrees in their current form is that the cable monopolies would argue in other forums that the Decrees reflect the views of the State Attorneys General and the Court on the appropriate MVPD market structure and competition principles. This is not a mere hypothetical issue. The FCC is in the midst of considering reconsideration petitions in its Program Access proceedings and thus the precise operation and scope of the rules are not yet finalized.[54]

Moreover, even after the proceedings have been completed, certain crucial aspects of the rules with respect to exclusionary practices may call for an evaluation of a particular MSO's program access obligation under an antitrust standard requiring a competitive market structure. With regard to its rules on non-price discrimination, for example, the FCC has stated:

> Our implementation of the non-price discrimination aspects of Section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define "unreasonable" as well as other illegal principles, and will be addressed individually through the enforcement process.[55]

This is by no means the only example of an area in the FCC's new rules that remains to be clarified through the FCC's enforcement process. For example, in interpreting Section 628(b)'s prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming, the FCC has stated:

> Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or prevent any multichannel video programming distributor from providing . . . programming to subscribers or consumers."[56]

54. See supra note 37.

55. Program Access Order at 55 ¶ 116.

56. Program Access Order at 16, ¶ 41.

A high-power DBS provider seeking to enforce its rights under this provision could, in the absence of clarification from this Court, be faced with a claim by the cable industry that the DBS industry structure sanctioned by the Decrees is dispositive on the question of whether the high-power DBS provider has been hindered significantly in its ability to obtain cable programming.

Accordingly, whatever results from this proceeding, the amici respectfully urge the Court to make a specific finding that this case in no way reflects the view of any party or the Court concerning the program access obligations the MSOs will have under other legal authorities, such as the Cable Act and the FCC's rules, or of what constitutes an adequately competitive market structure or conduct under those authorities.

D. The Court Should Exercise Its Equitable Discretion To Refuse To Sanction The Decrees Because Of Their "Clear Anticompetitive Effect"

This Court has long since resolved the propriety of refusing to approve an antitrust consent decree with a "clear anticompetitive effect." Accordingly, the Court should adopt its previous approach in State of New York v. Dairylea Cooperative, Inc., 547 F. Supp. 306, 308 (S.D.N.Y. 1982). In Dairylea Cooperative, the state of New York sued a dairy cooperative for conspiring to fix the wholesale and retail prices price of milk and to allocate retail customers. As part of the proposed settlement, the defendant would have issued "cents-off coupons" redeemable for discounts on its products. Id. at 308. This Court rejected the proposed settlement based upon the "clear anticompetitive effect of the couponing plan." Id. The Court reasoned:

> The plan unquestionably both gives substantial future marketing advantages to Dairylea, the alleged antitrust wrongdoer, and makes no effort to at least endeavor to provide that payments are at a minimum made to those very customers actually injured in the past by Dairylea's allegedly wrongful conduct. As I read it, the plan which plaintiff and Dairylea propose converts a "compensatory" legal settlement into a marketing program.

Id. Significantly, the Court pointed out in rejecting the settlement the fact that the defendant's "competitors" were "disadvantaged at every turn" by the settlement, and that the parties should come up with "further proposals that adequately deal with the above concerns." Id. This Court should similarly require the parties to propose real program access protections as a condition of settlement, and should decline to lend its imprimatur to unreasonably discriminatory access protections presented in the guise of consumerism. The Decrees, like the Dairylea Cooperative plan, damage a significant group of competitors, competition, and consumers - and should therefore be rejected.

V. CONCLUSION

This Court should act to ensure that the Decrees promote fair competition in the MVPD industry, and should reject or conditionally approve the proposed settlements if they do not. See United States v. American Telephone and Telegraph Co., 552 F. Supp. at 216. DBS providers are the primary nationwide emerging competitors to cable television, yet, the terms of the proposed settlements -- in particular Section V.A.1.(g) of the Primestar Decree and Section IV.A.1.(j) of the Viacom Decree -- disadvantage DBS providers "at every turn." Dairylea Cooperative, Inc., 547 F. Supp. at 308. In particular, the proposed Decrees disadvantage DBS as a major class of cable competitors by expressly targeting and carving out from their protections over half of the Universe of DBS providers that can viably compete with cable; by sanctioning anticompetitive exclusive arrangements at other DBS orbital locations; by imposing a benchmark of allegedly "reasonable" rates on DBS providers that in reality ensures that DBS providers can only be charged anticompetitive rates; and by treating the DBS industry disparately in the decrees relative to other technologies.

This Court should accordingly reject the Decrees in their current form.

Respectfully submitted,

By: Gary M Epstein /MW

Gary M. Epstein (4790)
Edward J. Shapiro
Nicholas W. Allard
James H. Barker
Alan L. Bushlow
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200
Attorneys for DirecTV, Inc.

By: John B Richards

John B. Richards (1574)
Christine M. Gill
Keller & Heckman
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
(202) 434-4040
Attorney for National Rural
Telecommunications Cooperative

By:

Andrew Jay Schwartzman (5430)
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
Attorney for Consumer Federation of
America

By: Gary R. Frank /ns

Gary R. Frank (9940)
President
Television Viewers of America, Inc.
1730 K Street, N.W., Suite 304
Washington, D.C. 20006

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CERTIFICATE OF SERVICE

I, Terri Thomas, a secretary in the law firm of Keller and Heckman, do hereby certify that a copy of the foregoing Reply of the National Rural Telecommunications Cooperative has been served this 28th day of July, 1993 by first class mail to the following:

Robert D. Joffe
Counsel for Time Warner
Entertainment Company, L.P.
Cravath, Swaine and Moore
Worldwide Plaza
825 8th Avenue
New York, New York 10019

Robert L. Hoegle
Counsel for Liberty Media Corporation
Carter, Ledyard and Milburn
1350 Eye Street, N.W.
Suite 870
Washington, D.C. 20005

Judith A. McHale
Counsel for Discovery Communications, Inc.
7700 Wisconsin Avenue
Bethesda, Maryland 20814

Jeff Treeman
President of United Video, Inc.
3801 S. Sheridan Road
Tulsa, Oklahoma 74145

Lawrence W. Secrest, III
Counsel for Viacom International Inc.
Wiley, Rein and Fielding
1776 K Street, N.W.
Washington, D.C. 20006

John D. Seiver
Counsel for Superstar Connection
Cole, Raywid and Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Patricia A. Mahoney
Counsel for United States Satellite
Broadcasting Company, Inc.
Fletcher, Heald and Hildreth
1300 North 17th Street,
11th Floor
Arlington, Virginia 22209

Terri Thomas